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IN THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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OF THE STATE OF TEXAS

Ralph Dewayne Watkins, Appellant

v.

The State of Texas, Appellee

Appeal from Navarro County

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STATE PROSECUTING ATTORNEY'S BRIEF AS AMICUS CURIAE

* * * * *

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Article 39.14 of the Code of Criminal Procedure establishes the statutory right to criminal discovery in Texas. Broadly speaking, its central provision requires discovery (upon request) of items "material to any matter involved in the action."[1] The Tenth Court of Appeals held that "material" means in the statute what it means under Due Process discovery cases: "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different."[2] That court considered this to be "well-established precedent" from this Court.[3]

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[1] TEX. CODE CRIM. PROC. art. 39.14(a).

[2] *Watkins v. State*, 554 S.W.3d 819, 822 (Tex. App.–Waco 2018, pet. granted) (internal quotations and citations omitted).

[3] *Id*. at 821.

Appellant wants "material" to include any evidence the State intends to use to prove its case at either phase of trial.[4] He concedes that this phrase has been interpreted but argues that amendments to article 39.14 in 2013—part of the Michael Morton Act—inherently broke with that precedent.[5] And he cherry-picks from this Office's *amicus* brief to the Tenth Court to make that argument.[6]

The Tenth Court of Appeals's reading of this Court's precedent is inaccurate. But that inaccuracy does not make appellant right, nor does it justify appellant's reliance on our *amicus* brief below.

I. Our *amicus* brief below.

Upon request from the Tenth Court, we offered an outline of the changes in article 39.14 and advice on how to approach the new statute. We critiqued the cases interpreting subsection (a), paying particular attention to the lack of distinction between the "good cause" requirement—removed by the Morton Act—and the "materiality" requirement at issue.[7] We repeatedly emphasized that article 39.14 has

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[4] App. Br. at 44.

[5] Acts 2013, 83rd Leg., SB 1611, eff. Jan. 1, 2014.

[6] App Br. at 8, 10-11, 19, 27, 31.

[7] SPA Amicus Br. at 7 ("As discussed in detail below, the meaning of 'material' is confused by case law."), 14 ("Unfortunately, the language used—especially recently—is sloppy and so has blurred what began as a real distinction between what constitutes materiality and 'good cause' for purposes of the statute.").

never been a mere codification of *Brady v. Maryland*, nor should it be.[8] And we pointed out threshold problems with the interpretation of the plain language at issue and offered an alternative.[9]

Importantly, however, we also pointed out the practical problems with any interpretation, including our own. Whatever "material to any matter involved in the action" means, it invites the State (sometimes the trial judge) to make that determination without knowing what evidence will be admitted or what defense counsel's strategy will be.[10] This Office concluded that "[t]he best practice is thus to disclose anything in its case that is not privileged."[11]

What this Office did not attempt, and what appellant has failed to do, is to offer a persuasive argument for why valid criticism and a fair-minded policy position trumps decades of statutory interpretation that forms the core of the Morton Act.

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[8] 373 U.S. 83 (1963). *See* SPA Amicus Br. at 10 ("Non-disclosed evidence the defense claims it was entitled to is often referred to as '*Brady* evidence' even when the claim is statutory. The two are distinct, and always have been."), 19 ("The 2014 addition of subsection (h) is proof that the Act was not intended to (re)codify *Brady*.")

[9] SPA Amicus Br. at 12 ("In the *Brady* context, the only two relevant matters are guilt and punishment. The Legislature could have easily said "material to guilt or punishment" [in subsection (a)] but it did not."), 12 ("In context, subsection (a) applies to evidence that could influence the jury on any number of subsidiary matters relevant to the ultimate issues of guilt and punishment.").

[10] SPA Amicus Br. at 7 ("Regardless of its meaning, however, review for materiality is typically retrospective from the point at which the State offers it or it is discovered post-trial. It should be measured instead from the State's point of view pretrial."), 20 ("Because of the breadth of the phrase 'to a matter involved in the action,' it is impossible for a prosecutor to discern pretrial whether something before him is material to some subsidiary issue, no matter how small, or is merely relevant to its consideration.").

[11] SPA Amicus Br. at 20.

II. Sometimes it is better to be consistent than to be right.

"The doctrine of *stare decisis* indicates a preference for maintaining consistency even if a particular precedent is wrong."[12] This Court has repeatedly said the interests underlying the doctrine are at their height for judicial interpretations of legislative enactments upon which parties rely.[13] That is because "interpretive decisions . . . effectively become part of the statutory scheme, subject (just like the rest) to [legislative] change."[14] For this reason, the Legislature should also be entitled to rely on this Court's interpretations of its work.

This Court has regularly revisited subsection (a) since 1980.

The phrase at issue was part of the original enactment of article 39.14 in 1965.[15] This Court's review of discovery rulings shows an evolution of the law on entitlement to discovery under the previous version of subsection (a):

- 1980: *Quinones* distinguished between statutory and constitutional discovery but concluded that the propriety of a

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[12] *Busby v. State*, 990 S.W.2d 263, 267 (Tex. Crim. App. 1999). "Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015).

[13] *Id*.; *Jones v. State*, 323 S.W.3d 885, 889 (Tex. Crim. App. 2010); *Thompson v. State*, 236 S.W.3d 787, 792 (Tex. Crim. App. 2007). The United States Supreme Court agrees. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

[14] *Kimble,* 135 S. Ct. at 2409.

[15] Acts 1965, 59th Leg., p. 475, ch. 722, §1, eff. Jan. 1, 1966.

discovery ruling under art. 39.14 is to be measured under the prevailing *Brady* standard.[16]

- 1992: *McBride* reviewed cases predating *Quinones* and added that "a criminal defendant has a right to inspect evidence indispensable to the State's case because that evidence is necessarily material to the defense of the accused."[17]

- 1996: *Massey* said that "good cause" is shown when the defendant shows the evidence would be material to his defense or is indispensable to the State's case, citing *McBride*.[18]

- 2012: *Ex parte Miles* said, "The materiality standard for purposes of Article 39.14 is the same as that applied in our *Brady* analysis above."[19] This analysis included the rule that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[20]

- 2015: *Ehrke* again said indispensable evidence is material to the defense of the accused; inspection must be permitted even without a showing of good cause.[21] It referred to "the materiality

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[16] *Quinones v. State*, 592 S.W.2d 933, 940-41 (Tex. Crim. App. 1980).

[17] *McBride v. State*, 838 S.W.2d 248, 251 (Tex. Crim. App. 1992). *See Detmering v. State*, 481 S.W.2d 863, 864 (Tex. Crim. App. 1972) (finding an abuse of discretion to refuse drug testing because, "Where the item on which the State bases its case is, for example, a drug, a visual examination would not always divulge anything of probative value."); *Terrell v. State*, 521 S.W.2d 618, 619 (Tex. Crim. App. 1975) ("We conclude that pursuant to our decision in *Detmering v. State* . . . appellant was entitled to an independent analysis of the marihuana.").

[18] *Massey v. State*, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996).

[19] *Ex Parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012).

[20] *Id*. at 666 (quoting *United States v. Agurs*, 427 U.S. 97, 109-10 (1976)) (internal quotations omitted).

[21] *Ehrke v. State*, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015). *Ehrke* was decided after the enactment of the Morton Act but was tried under the previous version of the statute.

of the evidence" as "the standard here."[22]

For decades, then, this Court has held that a trial court abuses its discretion by denying discovery 1) when doing so would violate the constitutional right to discovery under *Brady* and progeny, or 2) when the thing to be discovered is indispensable to the State's case, regardless of whether its value to the defense was speculative.

Appellant offers no good reason to reject this established interpretation.

Appellant offers two arguments for why the Morton Act breaks with this Court's precedent. The first—subsection (h) would render the old understanding of subsection (a) a nullity—is based on two flawed premises. The second—the deletion of "good cause" from subsection (a) broadened its reach—is more interesting but similarly unavailing.

Appellant's basic understanding of subsections (a) and (h) is wrong.

Appellant argues, "If Article 39.14(a) is limited to *Brady* evidence, then subsection (h) [is] unnecessary"[23] because subsection (h) "mirrors the constitutional materiality standard."[24] Subsection (a) isn't, and subsection (h) doesn't.

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[22] *Id*. at 614.

[23] App. Br. at 10.

[24] App. Br. at 27.

As demonstrated above, subsection (a)'s reach has not been limited to *Brady*. This Court has held since at least 1992 that it includes evidence that forms the basis of the State's case regardless of whether it is exculpatory or even favorable to the accused. Moreover, subsection (a) has always included the defendant's statements, something that *Brady* has never included because *Brady* contemplates information unknown to the defense and defendants are aware of their statements.[25]

Nor is subsection (h) co-extensive with *Brady*. It imposes a somewhat *Brady*-like duty on prosecutors to disclose "exculpatory, impeachment, or mitigating document, item, or information,"[26] but it does not require a showing of materiality as that term is defined. Rather, the duty extends to anything that merely "tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."[27]

Subsections (a) and (h) offer more protection than *Brady* by requiring disclosure without a showing of constitutional materiality, but they do it in different ways. Because they are neither coextensive nor limited to *Brady* evidence, one cannot render the other a nullity.

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[25] *Hayes v. State*, 85 S.W.3d 809, 814-15 (Tex. Crim. App. 2002).

[26] TEX. CODE CRIM. PROC. art. 39.14(h).

[27] *Id*.

Appellant cannot show good cause for his "good cause" theory.

One of the most important things the Morton Act did was remove from subsection (a) the requirement that the defendant show "good cause" for discovery and replace it with discovery-upon-request. Appellant's argument is not fully developed, but the gist seems to be that this Court has "used the *Brady* standard for materiality to measure 'good cause.'"[28] The implication is that the meaning of the phrase "material to any matter involved in the action" was never contemplated by this Court's cases. If this is his argument,[29] appellant has failed to prove it.

For appellant to succeed, he would have to show that *Quinones*, *McBride*, *etc*. were all exclusively about the definition of "good cause." That cannot be established from the cases. Even if *Quinones* was primarily about "good cause," this Court later emphasized an "indispensability" alternative that is incompatible with *Brady*. It later said "indispensability" applied regardless of "good cause." On the face of these cases, it is impossible to know which parts (if any) dealt exclusively with "good cause" and which dealt with statutory "materiality." Appellant has not tried to harmonize them. A retrospective unified theory could be conceived of—this Office

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[28] App. Br. at 19 (citing *Quinones*).

[29] Some of this argument appears based on the flawed assumptions discussed above, so it might be misconstrued here. App. Br. at 19-20.

did[30]—but it would be a rationalization glossing over inconsistencies rather than a straight reading of the cases.

III. The enactment of the Morton Act demands adherence to this Court's precedent.

This Court has the power to re-imagine or even overrule its precedent, but it should honor the doctrine of *stare decisis*. Appellant ultimately argues that the adherence to this Court's cases defining subsection (a) would not give effect to the Legislature's change to the statute.[31] The opposite is true. The fact that the "materiality" clause at the heart of subsection (a) survived such a dramatic overhaul of the statute shows how important its established meaning was and is. The rest of subsection (a) is, as it always has been, based around it. The new duties and rights added by other subsections supplement it. In a sense, the established meaning of that phrase was the foundation of the Morton Act. That is the most important reason to reaffirm this Court's precedent.

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[30] SPA Amicus Br. at 20 ("The fight was not over whether they were 'material,' as contemplated by the statute; it was over whether the trial court could refuse inspection notwithstanding their materiality.")

[31] App. Br. at 38.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,780 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of January, 2019, a true and correct copy of the State's Brief as Amicus Curiae has been eFiled or e-mailed to the following:

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